

DONALD B. KNARD
Claimant

APPLEBEES SERVICES, INC.
Respondent

LIBERTY MUTUAL INSURANCE CORP.
Insurance Carrier

ORDER

ISSUES

Claimant contends he sustained personal injury by accident arising out of and in the course of his employment on December 10, 2014. Claimant argues his work accident was the prevailing factor causing his injuries, medical condition and resulting disability or impairment. Claimant maintains his symptoms changed as a result of the accident; that his lumbar MRI showed a distinct injury; and that Dr. David Edalati's uncontroverted opinion was claimant's accident was the prevailing factor causing his medical condition, need for treatment and disability or impairment. According to claimant, the ALJ's finding that "[t]he right-sided findings by the chiropractor tended to show the S1 nerve root condition was occurring prior to the December 10, 2014, accident"¹ is without basis.

Respondent argues claimant failed to prove his accident was the prevailing factor, based on inconsistencies in claimant's testimony and in the medical records. Respondent requests the Board affirm the ALJ's decision.

¹ ALJ Nunc Pro Tunc Order (April 23, 2015) at 2.

The issues raised for the Board's review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?
2. Was claimant's alleged work accident the prevailing factor causing his injury, medical condition and resulting disability or impairment?

FINDINGS OF FACT

Claimant's testimony

Claimant claims he sustained personal injury by accident working for respondent on December 10, 2014. He testified he was walking behind his manager through the "expo line" next to a drink machine. According to claimant, he stepped on an ice cube with his right foot, causing him to slip. He grabbed his manager and did not fall to the floor. Claimant did not request treatment from respondent until December 16, 2014.

Prior to his alleged accident, claimant was treated by Dr. Fulk, a chiropractor, for "[m]ild lower back pain."² Claimant testified Dr. Fulk provided adjustments to his low back and neck. When deposed, claimant testified he experienced no pain in his lower extremities prior to his accident. However, when claimant was asked at the preliminary hearing to review Dr. Fulk's records, he admitted he did have pain into his left leg before the accident.

Claimant testified he told Dr. Fulk on November 23, 2014, he could not sit more than five minutes and if he did, he found it difficult to stand up. Claimant returned to Dr. Fulk on November 24, 2014, complaining of moderate, constant, sharp low back pain and minimal pain in his left thigh. Claimant testified he returned to Dr. Fulk on November 26, 2014, with mild, constant, sharp low back pain and minimal pain in his left thigh. When claimant returned to Dr. Fulk on November 28, 2014, he reported symptoms of mild, constant, sharp low back pain.

Claimant testified his left lower extremity symptoms subsided as of November 28, 2014, 12 days before his alleged injury. Claimant continued treatment with Dr. Fulk after his left leg symptoms resolved. Claimant disputed that portion of Dr. Fulk's records showing prior right radicular involvement.

² P.H. Trans. at 6.

Claimant testified that two days after his accident, on December 12, 2014, he told Dr. Fulk about his accident. Claimant testified he had neither right nor left leg symptoms on December 12. Claimant last saw Dr. Fulk on December 15, 2014.

Claimant asserted that about five or six days following his accident, he began experiencing right leg symptoms. Claimant testified he felt numbness, burning down the back of his right leg and severe right leg pain. According to claimant, he talked to his supervisor on December 16, 2014, about seeing a doctor because his right leg was numb and he was scared. Claimant left work on December 16 to seek treatment.

On December 16, 2014, claimant went to Arbor Creek Family Care, where he was seen by Danelle L. Perry, M.D., and reported right leg pain. Claimant testified he went to Arbor Creek instead of Dr. Fulk because his symptoms were different. Claimant disagreed with the Arbor Creek records that stated claimant's pain started over a month before. Claimant testified that reference was for his back pain, not his right lower extremity symptoms. Claimant testified he disagreed with Arbor Creek's records that indicated claimant said the chiropractic treatments were not helping. Claimant did not tell Arbor Creek about his December 10, 2014, accident. Claimant underwent a lumbar MRI scan on December 18, 2014.

Claimant testified he went to the Overland Park Regional Medical Center Emergency Room on December 19, 2014, for severe right leg pain. The emergency room records make no reference to the December 10, 2014, accident. Claimant received an injection and a steroid pack.

After working one hour on December 23, 2014, claimant left work to see Dr. Marvin Faulkner at the Kansas Institute of Medicine, a pain management group. Claimant testified he told Dr. Faulkner about his complaints since November 2014. According to claimant, he told Dr. Faulkner about his accident and that he felt pain a few days later. The records indicate claimant bent over at work and felt severe pain. Claimant disagreed with Dr. Faulkner's records, which refer to lower back pain radiating down to the right leg. According to claimant, he only experienced right leg pain. Dr. Faulkner reviewed claimant's MRI and prescribed an epidural injection.

Claimant again contacted the Kansas Institute of Medicine to talk to Dr. Faulkner about obtaining clearance to return to work. Claimant testified that on January 20, 2015, he met with Dr. Edalati, Dr. Faulkner's partner. Dr. Edalati talked to claimant about his right leg and discussed his MRI results.

Claimant testified since the accident, he no longer has pain in his back and left lower extremity, but only in his right lower extremity. Claimant's condition has not changed since the accident. If he stands for any length of time, his right leg goes numb and he experiences severe pain down his right leg.

Dr. Fulk's records

Charles E. Fulk, D.C., treated claimant from November 23, 2014, to December 15, 2014. Dr. Fulk's records state that on November 23, 2014, claimant complained of moderate constant sharp low back pain and nominal frequent aching pain in the left thigh. Claimant had lower back pain with left anterior thigh pain on the left. Claimant reported sitting and standing exacerbated his symptoms

Findings on physical examination included fixation of the right Ilium and sacrum. Other findings included passive leg raise test positive on the right; passive leg lowering test positive on the right; active leg raise test positive on the right and active leg lowering test positive on the right.

Claimant saw Dr. Fulk on December 8, 2014, two days before the alleged accident, and on December 12, 2014, two days following the alleged accident. Claimant reported on December 12 his lumbar syndrome was the same as it was in his last visit on December 8. On December 12, claimant told Dr. Fulk he "slipped 2 days ago and exacerbated his low back pain."³

Arbor Creek Family Care records

On December 16, 2014, claimant saw Danelle L. Perry, M.D. at Arbor Creek Family Care. Dr. Perry's records indicate claimant complained of back pain that radiated down his right leg with numbness. Claimant said his sciatica was worsening. The Arbor Creek Family Care records make no reference to claimant's alleged accident six days before.

Dr. Perry diagnosed paresthesia, low back pain with radiculopathy. She recommended conservative care and ordered an MRI.

MRI Report

The report of the December 18, 2015, MRI provides: no acute abnormal signal identified in the lumbar spine; mild facet arthropathy at L2-3 and L3-4 with mild foraminal narrowing; mild disk degeneration and facet arthropathy at L4-5 with mild central and foraminal stenosis; moderate disk degeneration at L5-S1, including a 7 mm broad based posterior disk protrusion eccentric to the right resulting in moderate to severe central stenosis as well as moderate to severe right anterolateral recess stenosis with right S1 nerve root impingement.

The MRI report makes no reference to the December 10, 2014, event.

³ P.H. Trans., Cl. Ex. 1 at 9.

Overland Park Regional Medical Center records

The December 19, 2015, hospital records indicate claimant complained of back pain, muscle spasm, with mild radiation of pain into the right leg and mild numbness in the right leg. Claimant described his mechanism of injury as “spontaneous-no mechanism.”⁴ Claimant reported the onset of his symptoms was “earlier this week.”⁵

There is no indication claimant provided the hospital a history of his December 10, 2014, accident.

Kansas Institute of Medicine records

Claimant saw Marvin Faulkner, D.O., at the Kansas Institute of Medicine on December 23, 2014. Dr. Faulkner’s records state claimant had lower back pain, radiating down his right leg with numbness. The records further state claimant’s pain started in mid-November and chiropractic therapy was attempted with some relief. Claimant also provided a history of bending over at work and experiencing severe pain. X-rays showed disk protrusion and degeneration at L5-S1.

On January 20, 2015, claimant saw David Edalati, M.D. at the Kansas Institute of Medicine. The record does not document this office visit. However, there is a report authored by Dr. Edalati dated January 20, 2015, that states:

The patient suffered a twist and near fall on 12/10/14 at work and subsequently developed pain and worsening condition as the patient continues to work. Therefore, the prevailing factor for the injury is the event of the twist and near fall and worsened by continuation of work. The patient will require epidural injections and possibly physical therapy and or surgery. The patient is not able to return to work at the present time and should be reevaluated after the injection.⁶

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b provides in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

⁴ P.H. Trans., Cl. Ex. 4 at 1.

⁵ *Id.*

⁶ P.H. Trans., Cl. Ex. 6.

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides in relevant part:

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

This Board Member finds the ALJ's preliminary hearing Order and Nunc Pro Tunc Order are hereby affirmed in all respects for reasons that include the following:

1. Claimant testified he was treated by Dr. Fulk before the alleged accident for mild low back pain and left anterior thigh pain. However, Dr. Fulk's records indicate claimant first consulted him on November 23, 2014, for moderate constant sharp low back pain. Claimant told Dr. Fulk he could not sit for more than five minutes and if he did, he would have difficulty standing up.

2. At his discovery deposition claimant denied having any lower extremity pain before December 10, 2014. However, when confronted with Dr. Fulk's records at the preliminary hearing, claimant admitted experiencing left lower extremity pain before his accident.

3. The Arbor Creek Family Care (Dr. Perry) records make no reference to the accidental injury, even though claimant saw this provider only six days after the accident.

4. Claimant saw Dr. Fulk two days before and two days after the accident. On the December 8 visit, claimant complained of mild low back soreness. At the December 12 visit, claimant told the doctor his lumbar syndrome was the same as it was at his last visit. However, claimant told Dr. Fulk on December 12 that he slipped two days before and exacerbated his low back pain. There were no right leg symptoms documented at the December 12 and December 15 visits.

5. The records of Arbor Creek and Overland Park Regional do not mention claimant's December 10, 2014, event. The report of the lumbar MRI scan makes no reference to the accident described by claimant. The records of Dr. Faulkner only refer to claimant bending over at work and experiencing severe pain. Claimant's testimony does not indicate he was injured while bending over at work.

6. Claimant disputed portions the records of three medical providers: Dr. Fulk, Arbor Creek and Dr. Faulkner.

7. As noted by the ALJ, there are some indications of right leg involvement before the accident. Dr. Fulk recorded in his November 23, 2014, note claimant had a number of positive right-sided findings. Specifically, Dr. Fulk recorded positive findings on the right when testing claimant in passive and active leg raising and lowering.

8. The testimony of claimant is not credible due to the inconsistencies in his testimony and in the medical records in evidence.

The Board generally gives some deference to an ALJ's findings as to credibility where the ALJ had the unique opportunity to observe the witness testify in person.⁷ Judge Hursh presided over the April 22, 2015, preliminary hearing at which claimant testified extensively.

9. Claimant contends Dr. Edalati's prevailing factor opinion is uncontradicted. The Board is not bound by uncontradicted evidence that is unreasonable, untrustworthy or improbable.⁸ It is unclear on what Dr. Edalati relied in reaching his prevailing factor opinion. There is no record of what history was provided to the doctor by claimant. The record does not reveal what medical records, if any, the doctor reviewed in reaching the opinion in his report. We can determine that the history apparently provided to Dr. Edalati is not the same as the history contained in the record of his partner, Dr. Faulkner. The record does not reveal if Dr. Edalati was provided with the films of the MRI or a report of the results of that test.

10. Claimant argues the lumbar MRI reveals definite evidence of an injury. However, it cannot be determined whether the positive findings reflected in the MRI report were caused by the accident claimant described or whether everything reflected in the MRI report represents degenerative disease, unrelated to the alleged accident. No physician provided evidence addressing what, if anything, in the MRI report indicates a traumatic cause for claimant's disk bulge at L5-S1.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

Claimant did not sustain personal injury by accident arising out of and in the course of his employment. Claimant did not prove the alleged accident was the prevailing factor causing his injury, medical condition and resulting disability or impairment.

⁷ *Whaley v. State of Kansas*, No. 1,044,622, 2011 WL 6122909, WCAB (Nov. 10, 2011).

⁸ *See Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁹ K.S.A. 44-534a(a)(2).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order and Nunc Pro Tunc Order of Administrative Law Judge Kenneth J. Hursh dated April 22, 2015, and April 23, 2015, are affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge